

Procurement Architectural and Engineering (A&E) Related Services Contracts - Questions and Answers

Last Updated April 15, 2016

Questions and Answers

This document is in the form of questions and answers and is categorized as noted below, to provide guidance that supplements Caltrans Local Assistance Procedures Manual, Chapter 10 relating to the procurement of Architectural and Engineering, also known as A&E, using Federal aid highway program (FAHP) funding. As the governing regulations and requirements for procurement of these service contracts are complex, the purpose of the guidance is to clarify the statutory and regulatory requirements of the Federal Highway Administration (FHWA) associated with the use of A&E related consultant services.

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I. Competitive Negotiation/Qualifications Based Selection Procurement Procedure

1. What is the competitive negotiation procurement procedure?

Competitive negotiation (as specified in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.7(a)(1)) is based on **qualifications based selection** procedures (as specified in 40 U.S.C. 1101-1104 (Brooks Act)) and is the primary method of procurement for engineering and design, also known as Architectural and Engineering or A&E related services using Federal-aid highway project funding. Equivalent State statute is Government Code 4525-4529.

The Brooks Act requires the selection of A&E related services on the basis of demonstrated competence and qualifications for the type of professional services required and negotiation of a fair and reasonable compensation. The qualifications based selection (QBS) procedures require public announcement/ advertisement of all requirements for the desired services. The Brooks Act further requires evaluation of current statements of qualifications, performance data, and statements regarding the proposed project or services submitted by prospective consulting engineering firms. Contracting agencies shall then select and rank a minimum of three firms based on demonstrated competence and qualifications in accordance with the established/advertised criteria.

Upon completion of the qualifications based evaluation and ranking of proposals, the contracting agency initiates negotiations with the most highly qualified firm to arrive at a fair and reasonable compensation for the solicited services which considers the scope, complexity, professional nature, and estimated value of the services to be rendered.

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If the contracting agency and most highly qualified firm are unable to negotiate a fair and reasonable contract, the agency may formally terminate negotiations and undertake negotiations with the next most qualified firm, continuing the process until an agreement is reached.

2. When must competitive negotiation/QBS procedures be used for procuring A&E related services?

In general, competitive negotiation/qualifications based selection procedures must be followed when procuring A&E related services using Federal-aid highway funds, or State funds, where those services are directly related to a construction project. Small purchase/simplified acquisition and noncompetitive procedures are the only two alternative procurement methods that may be utilized under limited conditions applicable to each method. For additional guidance regarding these procurement methods, see questions in subsequent sections.

3. What are A&E related services?

A&E related services include program/project management, construction management/engineering, feasibility studies, preliminary engineering, design, engineering, surveying (right of way engineering), mapping, landscape architecture, or architectural related services, as well as incidental services connected to and for the purpose of development and implementation of Federal-aid highway project. The Brooks Act further defines architectural and engineering related services as professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed, approved, or logically/justifiably performed by a person licensed, registered, or certified as an engineer or architect to provide the services. Over time, A&E services have included environmental studies required to prepare and develop environmental documents such as NEPA and CEQA. California Government Code 4525-4529, requires similar procurement process for similarly defined services for all State funded projects.

4. What are Non-A&E related services?

Some of the services or activities required for Federal-aid highway project are considered non-A&E. They are related to right of way appraisal and acquisition activities, conducting public outreach during environmental clearance process or construction phase of project. These activities are not included in the definition of A&E services – they are not engineering or architectural in nature - requiring competitive negotiations/qualification based selection.

There are also a class of projects funded thru Federal-aid highway funds, such as Transportation Alternatives Program (TAP) or Active Transportation Program (ATP) that require non-A&E services. These services typically include educational and outreach activities.

Local public agencies must use their own procurement policies and procedures, provided that the procurement conforms to applicable state laws, the California Public contract Code 10301-10381, to procure Non-A&E related services funded by Federal-aid project.

5. What if A&E services required under Federal-aid project are not directly related to a construction project, such as planning studies?

Planning studies or other services which are not included in the definition of A&E related services, or are not directly related to a construction project, will generally not require procurement through a QBS process. Planning studies, for example, are typically based on a regional or corridor assessment of a facility or network (not project specific) where subsequent engineering and project development services for a specific project must be undertaken prior to letting the project for construction. Although generally not required in those situations under Federal laws and regulations, State and local licensing and procurement laws and regulations may require use of QBS procedures to procure these services.

The determining factor for the required use of competitive negotiation/qualifications based selection procedures is whether the services being procured are related to a specific construction project and/or whether the services require work to be performed, provided by, or under the direction of a registered engineer or architect.

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If a planning study is to determine the need for improvements within a corridor, conduct travel demand studies, or to obtain information on costs for planning and programming processes, the consultant may not need to be procured under a qualifications based selection process. If a planning study involves development and consideration of detailed alternatives in a corridor or any activities or analyses that pertain to development and furtherance of a specific project, the consultant may need to be procured under a qualifications based selection process. The answer lies within the details of the scope of services needed and the applicable State and local laws, regulations, policies, and procedures.

6. If there is no Federal-aid highway project funding participating in an A&E related services contract, are the Federal competitive negotiation/QBS procurement procedures still applicable?

No, Federal laws and regulations for procuring, managing, and administering A&E related services contracts are specific to the use of Federal-aid highway project funds for the A&E related services.

For example if no federal funds is used in the Preliminary Engineering (PE) phase of a Federal-aid highway project, A&E services contract for that phase of the project does not have to follow QBS process reflecting the Federal laws and regulation. The contracting agency may procure the services in accordance with its own established policies and procedures which reflect applicable State and local laws. However, the costs of consultant service contracts that utilize only State or local funding which were not procured, negotiated, or administered in accordance with applicable Federal laws and regulations would not be eligible to apply toward the non-Federal share of costs for subsequent phases (e.g., construction) of a Federal-aid highway funded project.

7. Under competitive negotiation/QBS procurement procedures, do A&E related services contracts have to be solicited by public announcement/advertisement? What form of public announcement are admissible?

Yes, the solicitation for A&E services shall be by public advertisement, or by any other public forum or method that assures qualified in-state and out-of-state consulting firms are given a fair opportunity to be considered for award of an A&E related services contract.

The solicitation should include the evaluation criteria with its weighting/relative importance that will be used to rate the firms for their competency and qualifications to perform the type of work requested. The solicitation should provide a clear and precise statement of the work to be performed, estimated schedule to accomplish the services, and method of compensation/payment. The solicitation must also allow sufficient time for firms to prepare and submit a proposal in response to the solicitation.

Advertisement in a major local newspaper of general circulation, technical publications of widespread circulation, professional associations and societies, recognized DBE organization, electronic communication boards or Internet web sites or clearing houses known for posting government contract solicitations such as Bidsync, or posting on the local agency's or other widely used websites are all acceptable method of advertisement.

To document website postings, the local agency should retain copies of screen shots displaying the posted "begin/end" dates.

8. Under competitive negotiation/QBS procurement procedures, may price be an evaluation criterion during the advertisement and selection phase?

No, as competitive negotiation/QBS procurement is to be based on demonstrated competence and qualifications for the type of professional services desired. As such, price shall not be used as a criterion in the evaluation and ranking/selection of the most highly qualified firm. All price/cost related items which include, but are not limited to direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as an evaluation criterion under QBS procedures.

9. Under competitive negotiation/QBS procurement procedures, may an in-State preference be used in the advertisement and selection phase?

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No, as an in-State preference does not assess the qualifications of potential service providers and application would limit competition.

The intent of a competitive negotiation/QBS process is to develop a wide pool of potential service providers to select from and selection must be based on qualifications. Therefore, the use of in-State preference as a criterion is prohibited. Through public advertisement, in-State and out-of-State firms must be given a fair opportunity to be considered for award of a Federal-aid highway project funded A&E related services contract.

10. Under competitive negotiation/QBS procedures, may a local office presence be an evaluation criterion during the advertisement and selection phase?

Yes, a local office presence may be utilized as a nominal evaluation criterion where appropriate in assessing the qualifications of firms to perform the solicited services.

Although a locality factor is not directly a qualification factor, a small locality criterion of no more than ten (10) percent of the total evaluation criterion may be used. This criterion cannot be based on political boundaries and should be used on a project-by-project basis for projects where a need has been established for a consultant to provide a local presence. Further, if a firm currently outside the locality area indicates as part of its proposal that it will satisfy that criteria in some manner, such as establishing a local project office, that commitment should be considered to have satisfied the local presence criterion. The intent is to only apply this evaluation criterion on projects where a local presence will add value to the quality and efficiency of the project provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project, available to compete for the services.

To maintain the integrity of a competitive negotiation/QBS procurement, the total of all allowable non-technical qualifications based evaluation criterion (local presence and/or Disadvantaged Business Enterprise (DBE) participation) should not exceed ten (10) percent of the total evaluation criteria.

11. May a contracting agency require that a consultant performing engineering work have a State Professional Engineer license to work in that State?

Yes, as licensure as a Professional Engineer serves as a means to validate the competence and qualifications to perform the desired A&E related services.

While such a requirement is based on the licensing and procurement laws of a State, the requirement to hold a license as a Professional Engineer is directly related to the qualifications of a consultant to perform the desired A&E related services. Furthermore, licensure as a Professional Engineer serves as a means to protect the public interest of the State in employment of professional engineers familiar with State procedures and requirements and satisfying professional liability standards of the State.

Similarly, a consultant may also be required to maintain any State business permits to practice/provide engineering services in a State as required by State laws and regulations.

12. May a contract be modified (amended) to add A&E related services that were not included in the advertised scope of services and evaluation criteria of the announcement/advertisement from which a qualification based evaluation and selection were conducted?

No, the addition of work not included in the advertised scope of services and evaluation criteria would be contrary to the intent of the competitive negotiation/QBS process to publicly announce all requirements and ensure qualified firms are provided a fair opportunity to compete and be considered to provide the prescribed services.

Only work included within the original advertised scope of services and evaluation criteria of the solicitation from which a consultant was selected based on qualifications to perform may be incorporated into a contract. Necessary or desired services which are outside of the advertised scope from which the qualifications based selection was conducted should be procured under a new advertisement, accomplished with in-house contracting agency staff, or performed under an existing on-call contract which allows for the desired services, necessary qualifications, costs, and schedule.

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If a contract is amended for an un-allowable scope of work, the contract amendment is considered sole-source, and subject to non-competitive procurement process and approval of a Public Interest Findings documentation.

Examples:

If a consulting firm was selected to conduct an environmental assessment of a project and the advertised scope and evaluation criteria related to only environmental work, the contract could not be modified to include design tasks. However, if the scope and selection criteria also included design elements for evaluation and ranking of consultants, then it would be permissible to modify the contract to include the design elements advertised.

If a consulting firm was selected to complete the design of a roadway and the advertised scope and evaluation criteria included only geometric, drainage, and other roadway design elements, the contract could not be modified to include the design of a bridge unless structure/bridge design was included in the advertised scope and evaluation criteria from which the consultant was selected based on qualifications to perform.

II. Other Procurement Procedures

1. In addition to competitive negotiation/QBS procedures, what other procedures are allowed for the procurement of A&E related services funded with Federal-aid highway project funding?

In addition to competitive negotiation/QBS, small purchase/simplified acquisition and noncompetitive procedures may be utilized under limited conditions applicable to each method. See subsequent question for more information.

For State-funded projects, there is no minimum threshold for alternative (small purchase) procurement of A&E services. All A&E services contracts for State-funded project must comply with qualification based selection process.

2. What are small purchase/simplified acquisition procedures and when may this procurement method be utilized for A&E related services funded with Federal-aid highways project funding?

Small purchase procedures (SPP) (as specified in 23 CFR 172.7(a)(2)) involve contracts with total costs below the Federal simplified acquisition threshold (currently established at \$150,000). Small purchase/simplified acquisition procedures for A&E related services do not have to follow a competitive negotiation/QBS given the amount of contract award, however, the contracting agency should take steps to ensure that an adequate number of qualified firms be considered. The FHWA considers three sources as the minimum number to meet the adequate number of sources requirement.

For small purchase procurements, State and local public agencies must follow the State's laws, regulations, and procurement procedures which are not in conflict with applicable Federal laws and regulations. Project phases and contract requirements should not be broken down into smaller components merely to permit the use of small purchase procedures.

Project phases should not be split into multiple contracts (project splitting) to take advantage of the SPP process and to circumvent the competitive negotiation/QBS process.

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3. Can price or cost be considered during the SPP procurement process?

Yes, the SPP process is not subject to Brooks Act requirement (40 UCS 1101-1104), therefore, if SPP is used as procurement method for A&E services, price and rate quotation could be obtained from an adequate number (three) of sources to be included in the consideration of final selection of the consultant.

4. What happens if a contract modification causes a small purchase contract to exceed the Federal simplified acquisition threshold?

The full amount of any contract modification or amendment that would cause the total contract amount to exceed the Federal simplified acquisition threshold (currently established at \$150,000), would be ineligible for FAHP funding. The FHWA reserves the right to withdraw all FAHP funding from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

5. What are noncompetitive procedures and when may this procurement method be utilized for A&E related services funded with Federal-aid highway project funding?

Noncompetitive procurement (as specified in 23 CFR 172.7(a)(3)) may only be used under limited circumstances. Contracting agencies desiring to use this procurement method must first submit a Public Interest Finding (PIF) to the Caltrans for approval, prior to utilizing this procurement method for Federal-aid highway project funded services. Circumstances under which a contract may be awarded by noncompetitive procurement procedures are limited to the following: the service is only available from one source, there is an emergency which will not permit the time necessary to conduct competitive negotiations, or after solicitation of a number of sources, competition is determined to be inadequate.

In addition to Caltrans approval for participation of Federal-aid highway project funding in a noncompetitive procurement, local public agencies must follow the State's laws, regulations, and procedures which are not in conflict with applicable Federal laws and regulations.

6. What if fewer than three (only one or two) proposals are received in response to an advertisement for A&E services with Federal-aid highway project funding?

If fewer than three proposals are received as the result of an advertisement, adequate number of responses to establish competition has not been achieved, therefore, the contracting agency must evaluate the following scenarios:

If only two proposals have been received, the contracting agency shall analyze the solicitation to determine if it contained conditions or requirements which arbitrarily limited competition. By calling prospective proposers or firms who obtained the advertisement documents or downloaded electronic version of the solicitation, determine if re-advertisement will result in improved competition. If the administering agency determines that the outcome of the solicitation will not change, the agency may proceed with procurement process with two proposers.

If the contracting agency receives only one proposal, the local agency must re-advertise. Prior to re-advertising, the local agency should thoroughly review the solicitation and advertisement document and remove any restrictive requirements or conditions that may limit possible responses.

Generally speaking, if the re-advertisement for the same contract yields only one response, the justification for non-competitive procurement has been met. The local agency should prepare a PIF with justification, subject to Caltrans approval.

7. For Federal-aid highway project funded A&E related services with total estimated contract costs exceeding the established small purchase/simplified acquisition threshold (>\$150,000) and which do not satisfy noncompetitive procurement requirements, may a contracting agency use its own procurement procedures that are different from the competitive negotiation/qualification based selection procedures?

No, competitive negotiation/qualifications based selection procedures must be utilized to procure these A&E related services.

III. Consultant Contract Audits and Review Process

1. Are audits required for federal-aid highways funded A&E services contracts?

All federal-aid highway projects funded A&E service contracts are subject to Caltrans Audit and Investigation (A&I) Risk Based Audit and Review Process described in Local Assistance Procedures Manual (LAPM), Chapter 10, Section 10.3.

A&I risk-based approach for A&E contract review is dictated by the dollar threshold of the proposed contract.

A&E contracts less than \$150,000 – no audit or review is required, but is optional; contracts between \$150,000 and \$1 M – subject to Case 1 requirements; contract between \$1 M and \$3.5 M – subject to Case 2 requirements; and contract above \$3.5 M are subject to Case 3 requirements. Figure 10-3 of LAPM Chapter 10 describes the decision tree with further details.

<http://www.dot.ca.gov/hq/LocalPrograms/lam/LAPM/ch10.pdf>

2. Are contract audit and review requirements apply to Sub-consultants too?

Yes, A&I risk-based audit and review requirement apply to both Prime and all Sub-consultants on federal aid highways project related A&E services contracts.

3. What other financial requirements apply to A&E service contracts?

All solicitation and advertisement (RFPs or RFQs) for A&E services contracts must include notifications to all proposers that contracts shall not be awarded to a consultant without an adequate financial and accounting management system as required by federal regulations (23 U.S.C. 112, 23 CFR 172 and 48 CFR 31), and that all consultants accepted to work on federal aid highway project A&E contract must certify an indirect cost rate for their services that is compliant with Federal acquisition Regulations (FAR) cost principles.

The solicitation must also specify and clarify the requirements of the risk-based audit and review process. See question 1 above.

4. What is Exhibit 10-K and what is it used for?

Exhibit 10-K of the LAPM is called the Consultant Certification of Contract Cost and Financial Management System. Prime and all Sub-consultants must submit 10-K forms with the cost proposal (in the sealed envelope) for all contracts over \$150,000 in value. Typically, the Prime consultant on the proposal collects the forms from their Sub-consultant and submit on their behalf.

It is the responsibility of the local (contracting) agency to collect all 10-K forms (once the most qualified consultant has been selected and the cost proposal envelope has been opened to initiate cost negotiations), and send to Caltrans A&I before approving or executing the contract

5. What is Exhibit 10-A (package) and what is it used for?

Exhibit 10-A is called A&E Consultant Audit Request Letter and Checklist. It is the responsibility of the local (contracting) agency to prepare the Exhibit 10-A with all supporting documents and sent to Caltrans A&I for Conformance Review for all A&E contract over \$1 M in value. Local agency must not approve or execute contract prior to receiving the Conformance Review report from Caltrans A&I and addressing all identified deficiencies, if any.

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The 10-A package must include a copy of the draft contract, contract cost proposal, Exhibit 10-Ks from the Prime and all Sub-consultants, Prime consultant Name and Contact information, Prime consultant Indirect Cost Rate (ICR) schedule or calculations, AASHTO's Uniform Audit and Accounting Guide – Appendix B - "Internal Control Questionnaire" completed by the Prime consultant, and copies of prior fiscal year ICR or Cognizant approved ICR for the Prime, if any.

Exhibit 10-A should be prepared after local agency selects the most qualified consultant. All information must be supplied by the Prime consultant, either as part of their cost proposal submittal (in the sealed envelope) or later after the final selection (most qualified consultant) has been made and announced, and cost negotiations begin.

Local agency may begin cost negotiations, but not conclude and execute contract with the most qualified firm until a Conformance Review Letter is received from Caltrans A&I, and all identified deficiencies, if any, are addressed. The Conformance Review should not take more than 30 working days.

6. What is Safe Harbor Rate and how does it work?

The Federal Highway Administration (FHWA) has developed a national indirect cost rate, the "Safe Harbor" indirect cost rate (SHR), currently equal to 110%, for use by eligible consultant firms on a test-evaluation basis. The testing period is from July 1, 2013 to June 30, 2016. It is anticipated that testing period will be extended.

SHR can be used by A&E Consulting firms providing engineering and design related services under a contract funded by a federal aid highway projects if firms do not have or can not develop prepare the required indirect cost rates in accordance with the Federal Cost Principles on an annual basis. These firms could be small firms, including many Disadvantaged Business Enterprise firms, which lack the financial sophistication to develop an indirect cost rate, or lack the resources to hire a Certified Public Accountant to conduct an audit and to develop a compliant indirect cost rate, or a new or start-up firms which do not have a contract-related cost history to use as a base for development of an indirect cost rate, or other A/E consulting firms, although established, may not have previous experience with federally-funded contracts for which a compliant indirect cost rate would have been developed.

Interested firms must complete SHR application process to be eligible to use a 110% indirect cost rate in a contract for federal aid highway project. For more information about SHR and application process, see Caltrans Division of Local Assistance Office Bulletin 13-07R at:

http://www.dot.ca.gov/hq/LocalPrograms/DLA_OB/2013/ob13-07r.pdf

IV. Contract Types and Compensation (Payment) Methods

1. What are contract types acceptable for Federal aid highway project funds?

There are three contract types that are typical for A&E consultant services for Federal aid highway project. Contract type refers to the method in which the contract is structured to cover the work, such as:

- Project-Specific Contracts
- Multiphase Contracts
- On-Call Contracts

Local agency should consider many factors in selecting the contract type. These factors include price competition, price analysis, cost analysis, type and complexity of the requirement, urgency of the requirement, period of performance or length of contract, consultant's technical capability and financial responsibility, adequacy of the contractor's accounting system, concurrent contracts, extent and nature of the proposed subcontracting, and acquisition history.

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Project Specific Contracts

Project-specific contracts provide for all the work associated with a specific project that is desired to be contracted with the consultant firm and requires detailed scopes of services. These contracts may provide for all work to be placed under contract at the same time depending on availability of funds. A project-specific contract is the traditional type of A&E consultant contract between the agency and an A&E consultant for the performance of a fixed Scope of Work related to a specific project or projects.

Multiphase Contracts

Multiphase contracts are similar to project-specific contracts except that the work is divided into phases such as survey, environmental, design, and right-of-way. Individual phases are negotiated and the work authorized while future phases may wait until later in the contract period before completing negotiation and authorization. Multiphase contracts give the agency some latitude in determining to what extent the consultant firm continues with the contract. They are also helpful for complex projects where the scope of a future phase is not well defined. They allow the agency to get complex projects under contract in minimal amount of time but require continual negotiations as each phase approaches.

Multiphase contracts permit the agency to terminate a contract at the end of a phase without the effort and possible disagreement associated with using the termination clauses in the contract. A Multiphase contract incorporates the task order concept for a specific project. The consultant contract is based on a general scope of work with a maximum dollar value and specifies the expertise needed for the project. A task order is generated for the portion of the project where main and detail tasks can be identified.

On-call Contracts (Indefinite Quantity/Indefinite Delivery)

On-Call Contracts cover basic contractual requirements without defining specific projects. They are set up to handle a number of projects or specialized services which are established during the contract period. New federal regulation limits duration of the on-call contract to maximum of five (5) years. The base or general contract sets up specific agreed rates, services to be provided, length of contract, and maximum dollar amount of the contract (new federal regulation also mandates a maximum amount of contract to be determined in the solicitation document, i.e. the RFQ).

Typically, On-Call Contracts are used when a specialized service will be needed for a number of different projects, e.g., field survey, wetland determination, and hazardous waste analysis. This is a very popular form of contract with many agencies. These contracts can range in scope from full service to single discipline functions. A standard On-Call Contract requires a consultant to provide work and services on an as needed or on-call basis. Task orders (or Work orders) are generated to stipulate what work and services are required for specific projects. An on-call contract provides for the repetitive performance of a specific work task for items such as surveying and utility designations and locating.

2. What compensation methods are allowed for Federal aid highway projects funded A&E related services contracts?

Lump sum, cost plus fixed-fee, cost per unit of work, and specific rates of compensation payment methods may be used. A single contract may contain different payment methods as appropriate for compensation of different elements of work. The payment method(s) used to compensate the A&E consulting engineering firm for all work required should be specified in the original contract solicitation /advertisement and in the executed contract and any subsequent contract modifications.

Compensation based on a "cost plus a percentage of cost" payment method whereby fee/profit increases with actual costs incurred or a "percentage of construction cost" payment method whereby compensation increases with the cost of project construction shall not be used (as specified in 23 CFR 172.9 (b)(2)). These payment methods provide no incentive for effective cost control by the consulting engineering firm.

(Actual) Cost Plus Fixed Fee

Cost Plus Fixed Fee is a payment method which once negotiated, the fixed fee does not vary, even though the actual cost may. However, it may be adjusted, through negotiation, as a result of significant changes in the work, services, or duration to be performed. Because the fixed fee does not vary in relation to the consultant's ability to control costs, the cost plus fixed fee contract provides for a low risk to the consultant and provides only a minimal incentive for effective cost management. Therefore, an audit at the completion of the work is very important. The fixed fee is based on the scope, complexity, degree of risk, and specialized expertise associated with the project. It is the most commonly used payment method for preliminary engineering and design. However, if preliminary studies and other information are sufficient to allow the development of a well-defined and specific scope of services, the lump-sum method might be more efficient. The Cost Plus Fixed Fee method is used when the Scope of Work is fairly well-defined, but the total engineering effort required to complete the work cannot be estimated precisely. The consultant is paid an agreed-upon amount for a fixed fee, based on estimated actual Scope of Work when contract is executed.

Lump sum

Lump Sum is a negotiated payment method. Along with cost plus fixed fee, it is the next most commonly used method of payment. It provides for a price which is not subject to any adjustment because of cost changes the consultant might encounter in the performance of the work. Because the consultant assumes full responsibility, in the form of profits or losses, for all the costs under or over the firm negotiated price, it has a maximum profit incentive for effective cost control in contract performance. This type of payment method imposes a minimum administrative burden on the contracting parties. The Lump Sum method of payment is suitable when reasonably definite design or performance specifications are available and whenever fair and reasonable prices can be established and agreed to at the outset. The Lump Sum method is used when the Scope of Work is well-defined and the total engineering effort can be estimated accurately. Once both parties have been agreed to the work effort in an executed consultant contract, a change in the amount of lump sum can only be made if the scope of work changes materially.

Cost per Unit of Work

This is a payment method that provides for the payment to the consultant of allowable costs incurred in the performance of the contract, to the extent prescribed in the contract. This method of payment is suitable for use when the work is repetitive and multiple, the effort per unit of work is well-defined but the number of units is uncertain, such as construction material testing work during construction management. It is essential that the consultant have a record of the actual work completed.

Specific (Fixed) Rate of Compensation

This payment method provides for the acquisition of services on the basis of direct labor hours at specified fixed hourly rates (rates include wages, overhead, general and administrative expense, and profit), and material at cost. This payment method should be used for contracts only when it is not possible at the time of contracting to estimate the extent or duration of the work or to anticipate costs with any reasonable degree of accuracy. This type of contract does not encourage effective cost control and requires almost constant monitoring. It can be used in the acquisition of A&E services to be performed for On-call contracts and in emergency situations. Examples include surveying work, geotechnical services and other small, open-ended tasks. The Specific Rate of Compensation method is used when the Scope of Work and the required work effort cannot be determined (indefinite delivery and indefinite quantity) at the time the consultant contract is executed. A specific rate of compensation is established for each labor class or employee by multiplying the wage rate by the specific rate factor established in each consultant contract.

Project Specific Contracts

Project-specific contracts provide for all the work associated with a specific project that is desired to be contracted with the consultant firm and requires detailed scopes of services. These contracts may provide for all work to be placed under contract at the same time depending on availability of funds. A project-specific contract is the traditional type of A&E consultant contract between the agency and an A&E consultant for the performance of a fixed Scope of Work related to a specific project or projects.

3. **What are the differences between the “specific rates of compensation” payment method and the prohibited “cost plus a percentage of cost” payment method?**

The “specific rates of compensation” payment method provides for reimbursement for consultant services on the basis of direct labor hours at specified fixed hourly rates (including direct labor costs, indirect costs, and fee (profit)) plus any other direct expenses/costs, subject to an agreement maximum amount. The “specific rates of compensation” payment method should only be used when it is not possible at the time of procurement to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy. Use of this payment method requires close monitoring by the contracting agency to ensure efficient methods and cost controls are employed by the consultant.

While the inclusion of fee (profit) in the loaded hourly rate(s) established for a contract allows the fee earned to be based on the labor hours worked on the project, this is not considered a “cost plus a percentage of cost” payment method. A key distinction for the “specific rates of compensation” payment method is that indirect costs and fee must be recovered as a component of the established, fixed hourly billing rates for labor hours worked.

Payment of fee as a separate percentage based on actual labor and indirect costs incurred creates a “cost plus a percentage of cost” arrangement whereby the consultant’s fee is increased automatically with increases in either direct labor or overhead costs. Both the “specific rates of compensation” and “cost plus a percentage of cost” payment methods could in theory render the same total compensation for services performed, however the prohibited “cost plus a percentage of cost” method allows the fee earned by the consultant to increase over the performance period of the contract with increases in the cost of direct labor and/or overhead. The “specific rates of compensation” method establishes a loaded, fixed hourly rate up front which will not change for the duration of the contract and provides reimbursement to the consultant based on the labor hours worked. The “cost plus a percentage of cost” method establishes fee percentages up front which are then applied to actual labor and indirect costs incurred by the consultant over the life of the project.

For example, should a consultant’s direct salary rates increase during the performance period of a contract, compensation under the “specific rates of compensation” payment method would not change. Whereas under the “cost plus a percentage of cost” method, as the actual direct labor or indirect cost rates increase, so does the associated fee recovered by the consultant. Under both methods, the more labor hours a consultant works, the more fee that is earned by the consultant, subject to an established total contract maximum amount. However, only under the “cost plus a percentage of cost” method, does the fee earned increase with increases in the cost of the labor hours worked.

Since the cost plus a percentage of cost method provides no incentive for cost control, it is prohibited from use on A&E related services funded with Federal aid highway project funding.

While the establishment of fixed hourly rate(s) and a maximum contract amount provide some cost control for the contracting agency under the “specific rates of compensation” payment method, consultants still have minimal incentive for efficiency. As such, this payment method is the least preferred allowable payment method and its use on contracts or for components of contracts generally should be limited to only smaller, basic tasks where it is difficult at the time of procurement to estimate the extent or duration of the work. If the scope of work and/or level of effort for the desired services become better defined, a more traditional “lump sum” or “cost plus fixed-fee” payment method should be employed.

V. Independent Cost Estimate

1. **What is an Independent Cost Estimate and when is it supposed to be prepared?**

Prior to the start of contract cost negotiations, an agency must prepare an estimate of the person hours needed to complete consultant work. The estimate becomes the basis of negotiating with the consultant for the contract payment method(s) that was established in the original solicitation (RFP or RFQ).

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In addition, agencies must consider the Disadvantage Business Enterprise (DBE) goal that was set on consultant contract. DBE goals and payments are closely monitored through the life of the consultant contract.

The Engineer's Independent Cost Estimate is a written itemized estimate normally prepared by the agency prior to the receipt of the consultant's proposal. The estimate will have an appropriate breakdown of specific types of labor required, work hours, indirect costs, and an estimate of the consultant's fixed fee for use during negotiations. The agency determines the work and services required, and then prepares a person hour estimate for the required work (tasks) and services. The independent agency Cost Estimate becomes the basis for ensuring that the consultant work and services are obtained at a fair and reasonable cost consistent with normal reimbursement for the work and services required and will be used as a basis for the agency's negotiations with prospective consultants. The contract team personnel responsible for preparing or reviewing portions of the scope of work need to assist the agency's contract administrator in the development of independent person hours, items for direct costs other than payroll, and other various cost estimates.

On-Call Contracts do not have any task (work) orders associated with them at the beginning, and therefore agency estimates for these actions are not detailed. However, each task order has associated scope of work tasks and detail tasks which are estimated and submitted separately for each task order. Whether working under a Project Specific contract, or an On-Call Contract or Multiphase contract, the understanding of the scope of work may change. As a result, the agency estimate may change as well. If the scope of work is found to be insufficiently detailed to prepare the estimate, the scope of work should be updated before the estimate is completed.

VI. Contract Cost Negotiation

1. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, what are the requirements for negotiation of a contract?

Upon completion of a qualifications based evaluation and ranking of proposals, the contracting agency initiates negotiations with the most highly qualified consulting engineering firm to arrive at a fair and reasonable compensation for the solicited services which considers the scope, complexity, professional nature, and estimated value of the services to be rendered.

The primary objective in negotiation is to reach agreement on a price which is fair and reasonable to the contracting agency while providing the consulting firm the greatest incentive for efficient and economical performance. The focus of negotiations should be on improving identification of the scope/tasks to be performed, the level of effort to complete those tasks, the experience and classifications of staff required/assigned to complete those tasks (which collectively result in total direct labor costs), other direct contract costs, and fixed fee.

Following ranking and selection, the contracting agency will open the sealed envelope containing the cost proposal from the most highly qualified consulting firm and begin negotiations. In some cases, and for more complex projects, an initial meeting with the consultant is necessary to establish a detailed understanding of the scope, services to be provided, and responsibilities for project development, deliverables, schedules, and other important facets of a project. Once a detailed, mutual understanding of the scope has been made, the most highly qualified consulting firm will prepare a complete cost proposal to perform the services and the contracting agency will refine their original independent cost estimate (see section V above).

2. What are the requirements of the cost proposal for an A&E contract?

Federal cost principles of the FAR requires that all labor costs be broken down to direct labor, indirect cost rate and fee/profit. Consultant rate sheet or rate schedule that just indicate hourly rate are generally not acceptable. The cost requirements apply to Prime consultants as well as all Sub-consultants (first, second or third tier subs, etc.).

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LAPM Chapter 10 provide sample cost proposal format (Exhibit 10-H) for different method of payment, including cost plus fixed fee, specified rate of compensation and cost per unit of work.

In addition to labor costs, A&E contracts may include other direct costs such as equipment rental, travel and consumables. Other direct costs otherwise known as ODCs must follow the requirement described in Exhibit 10-H of the LAPM.

3. How should fixed fee be established or negotiated on a Federal aid highway funded A&E related services contracts?

The establishment of the fixed fee should be project specific and shall consider scope, complexity, and professional nature of the services to be rendered. Other considerations may include the size and type of contract as well as the duration and degree of risk involved in the work. Fixed fees in excess of fifteen (15) percent of the total direct and indirect costs of the contract may be justified only when exceptional circumstances exist.

Caltrans has established a worksheet for calculating fee/profit for A&E contracts that is based on five factors, such as complexity, duration, risk, size and number of sub-consultants in the contract. The worksheet is available upon request.

4. May a contracting agency utilize statewide average indirect cost rates in the estimation, negotiation, administration, and payment of FAHP funded A&E related services contracts?

Contracting agencies shall use and apply a consultant's cognizant approved indirect cost rate, or an accepted rate established in accordance with the FAR cost principles, for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and the rate shall not be limited by administrative or de facto ceilings of any kind. Use of a statewide average indirect cost rate in the analysis of contract costs or the negotiation and administration of the contract creates an arbitrary limitation which does not comply with Federal requirements.

A contracting agency may use a statewide average indirect cost rate to estimate overall project costs to initially scope or program a project and to serve as an indicator of the level of effort moving forward. However, once the most highly qualified consulting firm is identified, contracting agencies must use the consulting firm's cognizant approved indirect cost rate, or rate accepted for use by the contracting agency if a cognizant approved rate does not exist, in preparing/revising an independent cost estimate to be used in negotiating and administering contracts or contract amendments in accordance with the aforementioned Federal laws and regulations.

5. May a contracting agency question the reasonableness of indirect cost rates for use and application to a Federal aid highway funded A&E related services contracts?

Reasonableness is determined during the audit or other evaluation of the indirect cost rate, conducted in accordance with GAGAS, and following the AASHTO Uniform Audit & Accounting Guide, and risk assessment process/risk management framework. Contracting agencies shall use and apply a cognizant approved indirect cost rate established in accordance with the FAR cost principles for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and the rate shall not be limited by administrative or de facto ceilings of any kind.

A contracting agency shall not request or start negotiations to obtain a lower indirect cost rate than was established by a cognizant approved audit. A lower indirect cost rate may be used only if offered/submitted voluntarily by a consulting firm as part of a cost proposal during contract negotiations. A consulting firm's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract.

6. **When negotiating contract costs and terms, or administering a contract, may a contracting agency request/establish limitations of a consulting engineering firm's direct salaries and wages?**

State and local public agency recipients of Federal grants are required to apply the FAR cost principles to determine the allowable costs for personal services contracts with commercial, for-profit entities. Limitations or benchmarks on consulting firm direct salaries and wages may be acceptable only if a contracting agency has performed an assessment of the reasonableness of proposed direct salary rates and established the limitations in accordance with the reasonableness provisions of the FAR cost principles.

This assessment of reasonableness should include a variety of factors. Factors that may be relevant include, but are not limited to, conformity with compensation practices of other firms: (i) of the same size; (ii) in the same industry; (iii) in the same geographic area; and (iv) engaged in similar non-government work under comparable circumstances.

An assessment consistent with the FAR cost principles for determining the reasonableness of direct salary costs would permit contracting agencies to establish direct salary compensation limitations or benchmarks based upon the objective consideration of the compensation factors discussed above. This assessment would be used to determine what is reasonable for the subject work to be performed based on the classification, experience, and responsibility of the employee performing the work, taking into consideration the factors identified above.

7. **May a contracting agency limit/benchmark a consulting engineering firm's indirect cost rate or direct salary rates on A&E related service contracts if no Federal aid highway funds are used in the contract?**

Yes, subject to State laws, policies, and procedures, State and local public agencies may place a limitation on or benchmark a consulting firm's indirect cost rate and direct salary rates if the A&E related services contract does **not** utilize Federal aid highway project funding.

The reasonableness provisions of the FAR cost principles for determination of allowable costs for personal services of commercial, for-profit entities apply only when any Federal grant funds are involved. Additionally, the indirect cost rate requirements in federal regulations apply only when Federal aid highway funding is participating on A&E related service contracts that directly relate to a highway construction project.

8. **During the cost negotiations, may a contracting agency require lower indirect cost rate or discount payment terms on Federal aid highway funded A&E related services contracts?**

No, a requirement for a unilateral discount from a consulting firm's negotiated compensation, or requiring consultant to lower their indirect cost rate, would be in violation of Federal laws and regulations applicable to A&E related services contracts utilizing Federal aid highway funding and directly related to a construction project.

As such, a contracting agency may not require or request lower indirect cost rate or discount payment as a negotiation point, or through standardized contract documents/templates. However, if a consulting firm, in the interest of its own financial management of the contract, voluntarily offered a lower indirect cost rate or discount payment term in its cost proposal during negotiations, the contracting agency could accept the discount payment terms provided the firm's offer is not a condition or qualification to be considered for the work or contract award. FAHP funding participation would then be limited to the Federal share of the discounted payments actually made by the contracting agency.

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VII. Conflicts of Interest

1. What are the conflict of interest related laws and regulations applicable to A&E related consultant services funded with Federal aid highway project funding?

In satisfying the requirements for the delivery and administration of the Federal aid highway funded projects, State DOTs and their sub recipients may engage the services of consulting firms to the extent necessary or desirable. However, State DOTs and their sub recipients must have adequate powers and be suitably equipped and organized to fulfill the requirements of the Federal aid highway grants. This includes providing and maintaining: adequate staffing accountable and responsible for projects, adequate delivery and administration systems for projects, and sufficient accounting controls to properly manage Federal funds to protect the public's interest against fraud, waste, and abuse of taxpayer resources.

It is important to understand that conflicts of interest may be direct or indirect (e.g., as result of a personal or business relationship). Additionally, the appearance of a conflict of interest should be avoided as an apparent conflict may undermine public trust if not sufficiently mitigated.

Conflict of interest requirements include:

- The requirement that no contracting agency employee who participates in the procurement, management, or administration of Federal aid highway funded contracts or subcontracts shall have, directly or indirectly, any financial or other personal interest in connection with such contract or subcontract (as specified in 23 CFR 1.33);
- The requirement that no person or entity performing services for a contracting agency in connection with a Federal aid highway funded project shall have, directly or indirectly, any financial or other personal interest, other than employment or retention by the contracting agency, in any contract or subcontract in connection with such project (as specified in 23 CFR 1.33);
- The requirement that no person or entity performing services for a contracting agency in connection with a Federal aid highway funded project shall have, directly or indirectly, any financial or other personal interest in any real property acquired for the project (as specified in 23 CFR 1.33);
- The requirement for non-State direct recipients and sub recipients of these direct grantees to develop and maintain a written code of conduct governing the performance of its employees engaged in the award and administration of Federal aid highway contracts; and
- The requirement for written procurement procedures which shall address monitoring a consultant's work for quality and compliance with applicable standards and specifications, and determining the extent to which a consultant may be liable for design errors and omissions; and
- The requirement for FHWA approval prior to procuring a consultant to act in a management role on behalf of the contracting agency (See section VIII - Other Considerations below; and
- The requirement for a full-time contracting agency employee to serve in responsible charge of a Federal aid highway funded contract.

2. May a contract be awarded to a single consulting engineering firm to provide both preliminary design and final design engineering services on a single Federal aid highway funded project?

Yes, provided appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

Additionally, the contracting agency must include in the contract solicitation and advertisement (RFP or RFQ) scope of work, sufficient level of detail, clarity, and specificity to ensure reasonable and successful evaluation of proposal and prospective consultants.

3. **May a contract be awarded to a single consulting engineering firm for the preparation of relevant environmental documents and associated analyses as well as both the preliminary and final design engineering services on a single Federal aid highway funded project?**

Yes, provided appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

A contracting agency may procure, under a single solicitation/contract, the services of a consulting firm to prepare any environmental impact assessments or analyses required for a project as well as subsequent A&E work on the project provided the contracting agency assesses the objectivity of the environmental documentation prior to its submission to FHWA, and that solicitation document (RFP or RFQ) includes sufficient and comprehensive details of all phases of projects, and the evaluation of all prospective consultants are accomplished based on a comprehensive scope consistent with the solicitation requirements.

4. **May a contract be awarded for final design services to a consulting engineering firm, prime or sub-consultant, which provided services during the environmental review and preliminary design engineering phase of the project?**

Yes, provided a NEPA decision document has been issued or if the NEPA process is still underway, appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

The contracting agency must ensure that during the solicitation and evaluation of the new contract, a fair, transparent process is conducted, that no favoritism is given to the incumbent, and that all consultants are given fair opportunity to compete for the contract as advertised.

5. **May a consulting engineering firm that performed design services on a Federal aid highway funded project be procured to perform subsequent construction engineering/management and/or inspection services on the project?**

Yes, Federal requirements and FHWA policies do not expressly prohibit the same consulting firm from providing services on subsequent phases (e.g., design and construction engineering/management and/or inspection) of a project that utilizes Federal aid highway funding.

This may be permissible provided contracting agencies have established the necessary controls and provide sufficient oversight to ensure that a conflict of interest does not exist or have approved procedures to mitigate any conflict or potential for a conflict. While not expressly prohibited under Federal requirements, this practice may be prohibited under State law or contracting agency policies and procedures. Prior to allowing a firm to provide services on multiple phases of a project, contracting agencies need to evaluate and demonstrate that their policies, procedures, and practices associated with the procurement, management, and administration of engineering consultant services comply with Federal and State laws and FHWA requirements.

A firm performing construction engineering/management and/or inspection services on the same project on which the firm also performed design services provides the firm an opportunity to influence or affect project decisions on scope changes, design changes, construction revisions, contract change orders, and other related issues. This can result in project delivery efficiencies, as the firm that designed the project is well-suited to verify that the project is being constructed in accordance with the design and can resolve issues related to the design on behalf of the contracting agency. However, this scenario may also pose a potential conflict of interest if the firm has a vested financial interest in failing to disclose deficiencies in its design work product and seeks to insulate itself from pecuniary liability in subsequent phases of the project, such as minimizing or ignoring design errors and omissions, rather than serving the best interests of the contracting agency and the public.

Procuring a different firm from the design firm to provide the necessary construction engineering/management and/or inspection services provides another level of review and reduces the risk of, or potential for, a conflict of interest.

Contracting agencies are responsible for ensuring the public interest is maintained throughout the life of a project and that a conflict of interest, direct or indirect, does not occur or is sufficiently mitigated by appropriate public agency controls. Contract documentation which clearly defines each contracting party's roles, responsibilities, and duties for a project is essential to the protection of the interest of all stakeholders. Prior to allowing a consulting firm to provide services on subsequent phases of the same project, the contracting agency must establish appropriate compensating controls in the form of policies, procedures, practices, and other safeguards to ensure a conflict of interest does not occur in the procurement, management, and administration of consultant services. In general, qualified agency staff serving in responsible charge of a project, coupled with comprehensive policies, procedures, and contract documentation, will mitigate the potential for conflicts.

Provided the necessary contracting agency controls and oversight practices are established, a consultant may be procured to provide both design and construction phase services for a project under a single solicitation. However, consideration should be given to the project scope and complexity, estimated duration of the preconstruction phase, objectivity of environmental analyses if also included within the scope of services, and the need to provide fair and open competition.

When design and construction phase services are procured under a single solicitation, the selection of the consulting firm must be based on the overall qualifications to provide both design and construction phase services, which require different skill sets, experience, and resources. Procuring these services under different solicitations may result in selection of a more qualified firm to perform services in each phase, as the most qualified firm to perform design phase services may not be the most qualified firm to provide construction phase services. Similarly, the qualifications and capacity of a firm may change over time. As such, it may not be appropriate to contract with a consulting firm to provide construction phase services at the outset of a design phase, knowing that these services may not be needed for an extended period of time until the preconstruction phase of the project is complete and construction funding authorized.

The contract with a consulting firm providing design phase services on a project may not be amended to include construction phase services unless the desired construction phase services were included within the original advertised scope of services and evaluation criteria of the solicitation from which a qualifications based selection was conducted. (See Competitive Negotiation Question & Answer No. 11)

4. What are the controls necessary to mitigate the potential for conflicts of interest with consultants providing services on subsequent phases of a project or serving in management roles?

Examples of the controls necessary to consider allowing a consulting firm to provide services on subsequent phases of a project or in serving in management roles for a contracting agency on projects utilizing Federal aid highway project funding include, but are not limited to:

- A written Consultant Services Procurement Procedures Manual (developed and approved as specified in which includes/addresses:
 - Conflict of interest guidance, policies, or procedures for consulting firms serving in roles as prime or sub-consultant on projects/contracts and associated impacts to a firm's ability to participate in other roles, project phases, or contracts;
 - Conflict of interest identification, disclosure, and mitigation plans and procedures for both contracting agency and consultant staff throughout all stages of project development and delivery;
 - Consultant errors and omissions policies and procedures;
 - Policies and procedures for a contracting agency to pursue a range of civil actions and penalties including fines, suspension, or debarment associated with fraud, waste, abuse, and identified conflicts of interest which were not disclosed; and
 - Provision for Hotline Complaints to the U.S. DOT Office of Inspector General (OIG).
- Contract documentation which clearly defines each contracting party's roles, responsibilities, and duties for a project.

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- Providing necessary resources and guidance to support management and oversight of conflict of interest concerns at a program and project level, such as providing a full-time contracting agency employee to serve in responsible charge of a Federal aid highway contract
- Monitoring, evaluation, and reporting on compliance with Federal and State laws and regulations and approved policies and procedures with respect to conflicts of interest. To ensure overall compliance and no conflicts of interest exist, this oversight and quality assurance should include regular sampling and evaluation of contracts and be documented by reports which identify any remedial actions to address findings.
- Training requirements/programs for contracting agency and consultant staff on contract management, ethics, conflicts of interest, laws and regulations, and approved policies and procedures.
- Periodic review and discussion of contracting agency conflict of interest policies with representatives of the consultant engineering industry.

VIII. Other Considerations

1. **If a State or local public agency does not use Federal aid highway funding for an A&E related services contract and uses its own procurement procedures, is the related construction project(s) still eligible for FAHP funding?**

Yes, a physical construction authorization is a separate Federal action which carries its own eligibility requirements.

Federal laws and regulations for procuring, managing, and administering A&E related services contracts are specific to the use of Federal aid highway funding for the A&E related services. Federal requirements do not apply to activities, phases, or projects that are funded with State or local funds. However, as with other project expenditures that do not comply with Federal requirements, the costs of consultant service contracts that utilize only State or local funding which were not procured, negotiated, or administered in accordance with applicable Federal and State laws and regulations would not subsequently be available to meet the non-Federal share of costs for subsequent phases (e.g., construction) of a Federal aid highway funded project. More information on non-Federal match requirements may be found at:

<http://www.fhwa.dot.gov/legregs/directives/policy/memonfmr20091229.htm>.

2. **May a contracting agency incorporate other parts of the FAR outside of the cost principles (as specified in 48 CFR 31) into their procurement, audit, and contract administration policies and procedures for Federal aid highway funded A&E related services contracts?**

Yes, a contracting agency may formally adopt, by statute or within approved written policies and procedures, any direct Federal contracting provision as long as it is not in conflict with the requirements, principles, or intent of the Federal laws and regulations applicable to the procurement of A&E related services contracts utilizing Federal aid highway project funding.

Generally, in order for a non-Federal contracting agency to apply Federal contracting provisions, the Federal grant program must incorporate by reference the particular Federal statute or regulation the contracting agency must apply. Alternatively, a contracting agency may formally adopt the direct Federal contracting requirement provided it is not in conflict with the Federal grant program requirements. This is consistent with the Common Grant Rule which authorizes a contracting agency to procure consistent with its own policies and procedures, except when an applicable Federal law or regulation conflicts with those procedures (as specified in 2 CFR Part 200). When the State or local policies and procedures are in conflict with Federal requirements, the Federal requirements prevail where use of Federal funds is involved.

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3. **What is the definition of “management role” as it pertains to the requirement for FHWA approval prior to procuring a consultant to act in a management role for the contracting agency - as specified in 23 CFR 172 Final Rule?**

A consultant acting in a management role may be defined as a consulting firm or individual representative of a firm acting on the contracting agency's behalf to perform inherently governmental functions or fulfilling a program or project administration role typically performed by the contracting agency. This could include providing oversight of a program element on behalf of the contracting agency or serving as a general engineering consultant (GEC) to manage and provide oversight of a major project, series of projects, and/or the work of other consultants and contractors on behalf of a contracting agency.

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